ATTORNEY FOR APPELLANT:

TERRY L. CORNELIUS
Cornelius & Weingartner
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

JEREMY J. GROGG
Burt Blee Dixon Sutton & Bloom
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN B. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0610-CV-445
	)	
COLDWATER PLACE, LLC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Brian D. Cook, Magistrate
Cause No. 02D01-0605-SC-9285

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

John B. Davis appeals the small claims court's judgment in favor of Coldwater Place, LLC ("Coldwater"). Davis raises one issue, which we restate as whether the small claims court erred in interpreting Davis's agreement with Coldwater. We affirm.

The relevant facts follow. Coldwater began negotiating with Davis for the lease of space in Coldwater Place Shopping Plaza for an Ace Hardware store. Leasing to Davis would have required an expansion of Coldwater's building. As negotiations on the lease progressed, the parties entered into the following agreement ("Agreement"):

> In order to induce Coldwater Place, LLC to hold open a lease offer for 16,517 square feet in the Coldwater Place shopping plaza **until January 13, 2006**, I, John Davis, agree to pay Six Thousand Dollars ($6,000.00) to Coldwater Place, LLC in the event that I do not enter into a lease for the property. This amount is to compensate Coldwater Place, LLC for cost incurred for architectural and engineering fees incurred to expand the facility as required. If a lease is entered into, this agreement will become null and void.
>
> Time is of the essence. If this agreement is not signed and returned by 5:00 PM, December 30, 2005, all Letters of Intent and other agreements will be cancelled and the property put back on the market.

Appellant's Appendix at 24 (emphasis in original). Davis signed the Agreement, and Coldwater started architectural and engineering processes for the building expansion. The January 13, 2006, deadline was extended to January 17, 2006, but Davis did not sign the lease by January 17, 2006. After the January 17, 2006, deadline passed, Coldwater notified Davis that the building expansion had been cancelled and that Davis owed $6,000.00 pursuant to the Agreement.

Coldwater then began negotiating with other prospective tenants for the space. On February 23, 2006, Davis sent Coldwater a signed lease agreement, but Coldwater

notified Davis that it was already negotiating with other tenants for the space and that it had decided to end any further negotiations with Davis.

Coldwater then filed a notice of claim against Davis in the small claims court seeking $6,000.00 pursuant to the Agreement. After a bench trial, the small claims court found:

> 1. The parties entered into a written agreement effective December 30, 2005. [Coldwater] agreed to hold open a lease offer for square footage in the Coldwater Place Shopping Plaza until January 13, 2006. The agreement clearly provides that in the event [Davis] did not enter into the lease for the property he agreed to pay $6,000.00 to [Coldwater]. The amount was to compensate [Coldwater] for costs incurred in architectural and engineering fees incurred to expand the facility as required. In the event the lease was entered into their agreement would become null and void.
> 2. The evidence presented at trial shows that [Davis] was provided with a final lease prior to January 13, 2006. The parties further stipulate that the deadline for the signing of the lease was extended to January 17, 2006 at 4:45 p.m. [Davis] failed to sign the written lease agreement by January 17, 2006 at 4:45 p.m. [Davis] breached the parties' agreement.
> 3. The agreement is clear and unambiguous. [Coldwater] is entitled to damages in the amount of $6,000.00.
>
> Judgment for [Coldwater] and against [Davis] in the amount of $6,000.00.

Appellant's Appendix at 6.

The issue is whether the small claims court erred in interpreting Davis's Agreement with Coldwater. Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). Under Indiana Trial Rule 52(A), the clearly erroneous standard applies to appellate review of facts determined in a bench trial with due regard given to the opportunity of the trial court

to assess witness credibility. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1067 (Ind. 2006). This "deferential standard of review is particularly important in small claims actions, where trials are 'informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.'" Id. at 1067-1068 (quoting City of Dunkirk Water & Sewage Dep't v. Hall, 657 N.E.2d 115, 116 (Ind. 1995)). But this deferential standard does not apply to the substantive rules of law, which are reviewed de novo just as they are in appeals from a court of general jurisdiction. Id. at 1068 (citing Lae v. Householder, 789 N.E.2d 481, 483 (Ind. 2003)). Similarly, where a small claims case turns solely on documentary evidence, we review de novo, just as we review summary judgment rulings and other "paper records." Id. The only issue in this case turns on the meaning of the contract, which is a pure question of law and is reviewed de novo. Id. (citing Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249, 251 (Ind. 2005)).

Davis argues that the parties' Agreement was illusory, ambiguous, and an unenforceable agreement to agree. We first address whether the Agreement is ambiguous. Resolution of this issue requires that we interpret the parties' Agreement. In interpreting a written contract, the court should attempt to determine the intent of the parties at the time the contract was made as discovered by the language used to express their rights and duties. Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 100 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The contract is to be read as a whole when trying to ascertain the intent of the parties. Id. The court will make all attempts to construe the language in a contract so as not to render any words, phrases, or

terms ineffective or meaningless. Id. The court must accept an interpretation of the contract that harmonizes its provisions as opposed to one that causes the provisions to be conflicting. Id. If the language of the instrument is unambiguous, we will determine the intent of the parties from the four corners of that instrument. Id. at 99-100. However, a contract is ambiguous when it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. Id. at 100.

The Agreement in question provides:

> In order to induce Coldwater Place, LLC to hold open a lease offer for 16,517 square feet in the Coldwater Place shopping plaza **until January 13, 2006**, I, John Davis, agree to pay Six Thousand Dollars ($6,000.00) to Coldwater Place, LLC in the event that I do not enter into a lease for the property. This amount is to compensate Coldwater Place, LLC for cost incurred for architectural and engineering fees incurred to expand the facility as required. If a lease is entered into, this agreement will become null and void.
>
> Time is of the essence. If this agreement is not signed and returned by 5:00 PM, December 30, 2005, all Letters of Intent and other agreements will be cancelled and the property put back on the market.

Appellant's Appendix at 24 (emphasis in original).

According to Davis, the Agreement could be read as follows:

> [A]s an inducement for Davis to execute the Lease, Coldwater agreed not to lease the property until January 13, 2006. Thereafter, they would be free to lease to others. Davis agreed to pay $6,000.00, in the event that he did not eventually enter into a Lease. Coldwater then had the option of executing the Lease with Davis, or executing the Lease with others, after taking into consideration the $6,000.00 that Davis agreed to pay if he did not execute a Lease.

Appellant's Brief at 9. Coldwater contends that the Agreement is unambiguous and that a reasonable person would not construe the Agreement in the manner advocated by

Davis. Coldwater argues that Davis's interpretation "would allow Mr. Davis to avoid his obligation of reimbursing Coldwater for the fees so long as Mr. Davis presented Coldwater with any lease, at any time, now or 50 years in the future, notwithstanding the fact that the deadline imposed by the Agreement had expired." Appellee's Brief at 9. Rather, according to Coldwater, the Agreement required Davis to enter into a lease with Coldwater by January 13, 2006, later extended to January 17, 2006, or pay the $6,000.00 in engineering and architectural fees.

The small claims court found that the Agreement was unambiguous and agreed with Coldwater's interpretation of the Agreement. We conclude that the small claims court properly interpreted the Agreement. Despite Davis's argument, the terms of a contract are not ambiguous merely because the parties disagree as to their interpretation. Stenger v. LLC Corp., 819 N.E.2d 480, 484 (Ind. Ct. App. 2004), trans. denied. Rather, as noted above, a contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation. Id. We conclude that a reasonable person would interpret the Agreement as inducing Coldwater to continue with the expansion of the building for Davis and holding the lease open while protecting Coldwater from incurring the engineering and architectural fees if Davis did not enter into the lease by January 13, 2006.

Moreover, even accepting Davis's interpretation of the Agreement that he could have entered into a lease with Coldwater after the January 17, 2006, deadline without paying the $6,000.00 in engineering and architectural fees, Davis's argument fails. Even

after the January 17, 2006, deadline, Davis did not enter into a lease with Coldwater. Although Davis eventually signed the lease in late February, the parties did not "enter into" a lease because Coldwater had already negotiated with other prospective tenants. Consequently, even under Davis's interpretation of the Agreement, he owes the $6,000.00 in engineering and architectural fees.

Davis also argues that the Agreement was unenforceable because it was illusory. An illusory contract is "[a]n expression cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has not committed himself in any manner." BLACK'S LAW DICTIONARY 748 (6th ed. 1990). "A fundamental concept of contract law is that a contract is unenforceable if it lacks mutuality of obligation--i.e., if it fails to obligate the parties to do anything." Security Bank & Trust Co. v. Bogard, 494 N.E.2d 965, 968 (Ind. Ct. App. 1986). "[M]utuality is absent when only one of the contracting parties is bound to perform, and the other party remains entirely free to choose whether or not to perform, and the rights of the parties exist at the option of one only." Id. (citing 17 C.J.S. Contracts § 100(1)(1963)). Davis argues that Coldwater was under no obligation to do anything under the Agreement. To the contrary, Coldwater clearly had an obligation under the Agreement not to lease the property to anyone else until January 13, 2006, later extended to January 17, 2006. Consequently, the Agreement is not lacking in mutuality and is not illusory. See, e.g., Rogier v. American Testing & Eng'g Corp., 734 N.E.2d 606, 618 (Ind. Ct. App. 2000) (holding that the parties' exclusive listing

agreement was not unenforceable as a matter of law for lack of mutuality), reh'g denied, trans. denied.

Lastly, Davis argues that the Agreement was an unenforceable "agreement to agree." "The law is well established that a mere agreement to agree at some future time is not enforceable." Wolvos v. Meyer, 668 N.E.2d 671, 674 (Ind. 1996). Davis seems to argue that the Agreement was an agreement to enter into a lease at a later date and that the Agreement is unenforceable because it does not contain the essential terms of the lease. However, Davis misinterprets the Agreement. The purpose of the Agreement was to induce Coldwater to continue with the expansion of the building for Davis and to hold the lease open while protecting Coldwater from incurring the engineering and architectural fees if Davis did not enter into the lease by January 13, 2006. The Agreement was not simply an agreement that the parties would enter into a lease at a later time. Consequently, the Agreement was not an unenforceable agreement to agree.[1] See, e.g., Wolvos, 668 N.E.2d at 678 (holding that the agreement was a binding contract and "no mere agreement to agree").

For the foregoing reasons, we affirm the small claims court's judgment for Coldwater and against Davis.

Affirmed.

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[1] Davis also argues for the first time in his reply brief that Coldwater failed to prove that it actually paid the $6,000.00 in engineering and architectural fees. See Appellant's Reply Brief at 3-4. "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005). Consequently, the issue is waived.

SULLIVAN, J. and CRONE, J. concur